CASE NUMBER: 034252/2022

MEMORANDUM OF LAW IN SUPPORT

Document prepared for:
kevin barlow

CASE NAME

Rosemarie Mckinnis Est Of, Kathleen Mckinniss, Carin Rosado, James Finn Est Of, Geraldine Finn Exr v. Ecohealth Alliance Inc, Peter Daszak, Janet D Cottingham Aka, Janet Dasz…

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Sherri L Eisenpress

CATEGORY

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STATUS

Active

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

IN RE SARS-CoV-2;

Index No. 034252/2022

KATHLEEN MCKINNISS, PROPOSED REPRESENTATIVE OF THE ESTATE OF ROSEMARIE MCKINNISS, DECEASED; CARIN ROSADO, individually; and GERALDINE FINN, AS EXECUTOR OF THE ESTATE OF JAMES FINN, DECEASED, DAVID CADDOO, EXECUTOR OF ESTATE OF PATRICIA MARIE CADDOO, DECEASED; MELANIE SMITH, EXECUTRIX OF ESTATE OF ROBERT SENDZISCHEW, DECEASED; KIMBERLY J. LEWIS, EXECUTRIX OF ESTATE OF ROBERT F. LEWIS, DECEASED; LISA PETER, PROPOSED REPRESENTATIVE OF ESTATE OF PATRICIA A. CHISLETT, DECEASED; and ROXANNE JONES, PROPOSED REPRESENTATIVE OF ESTATE OF DALE JONES, DECEASED,

Plaintiffs,

-against-

ECOHEALTH ALLIANCE, INC., PETER DASZAK, JANET D. COTTINGHAM a/k/a JANET DASZAK, RALPH BARIC, W. IAN LIPKIN, and JOHN AND JANE DOES 1-1000,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS ECOHEALTH ALLIANCE, INC., PETER DASZAK, AND JANET COTTINGHAM'S MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT, WITH PREJUDICE

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PRELIMINARY STATEMENT

Defendants EcoHealth Alliance, Inc. ("EcoHealth Alliance"), Peter Daszak, s/h/i/a Peter C. Daszak ("Daszak"), and Janet D. Cottingham, a/k/a Janet Daszak ("Cottingham") (collectively, "Defendants"), respectfully submit this memorandum of law in support of Defendants' motion (the "Motion") for an order, pursuant to New York Civil Practice Law and Rules ("CPLR") Rules 3211(a)(1), 3211(a)(5), and 3211(a)(7), dismissing the Amended Verified Complaint, dated January 1, 2023 (NYSCEF Doc. No. 36) (the "Complaint"), filed by plaintiffs, Kathleen Mckinniss, Proposed Representative of the Estate of Rosemarie Mckinniss, Deceased, Geraldine Finn, as Executor of the Estate of James Finn, Deceased, David Caddoo, Executor Of Estate Of Patricia Marie Caddoo, Deceased, Melanie Smith, Executrix of Estate Of Robert Sendzischew, Deceased, Kimberly J. Lewis, Executrix of Estate of Robert F. Lewis, Deceased, Lisa Peter, Proposed Representative of Estate of Patricia A. Chislett, Deceased, Roxanne Jones, Proposed Representative of Estate of Dale Jones, Deceased, (collectively, the "Estate Plaintiffs"), and Carin Rosado ("Rosado") (together with Estate Plaintiffs, "Plaintiffs"), with prejudice, and granting such other and further relief for Defendants as this Court deems just and proper.[1]

The Complaint asserts thirteen causes of action for: (i) Negligence (Compl., at ¶¶ 415-40); (ii) Gross Negligence (Compl., at ¶¶ 441-67); (iii) Strict Liability (Compl., at ¶¶ 468-82); (iv) Negligent Failure to Warn (Compl., at ¶¶ 483-94); (v) Intentional Infliction of Emotional Distress (Compl., at ¶¶ 495-504); (vi). Negligent Infliction of Emotional Distress (Compl., at ¶¶ 505-16); (vii) Assault and Battery (Compl., at ¶¶ 513-16); (viii) Medical Monitoring and Fear of Contracting Illness (Compl., at ¶¶ 517-22); (ix) Civil Conspiracy (Compl., at ¶¶ 523-33); (x) Wrongful Death (Compl., at ¶¶ 534-41); (xi) Survival (Compl., at ¶¶ 542-546); (xii) Breach of Warranty (Compl.,

[1] Defendants EcoHealth Alliance, Daszak and Cottingham also join in the motions filed by Defendants W. Ian Lipkin and Ralph Baric whose arguments are hereby incorporated by reference as if fully set forth herein.

at ¶¶ 547-58); and (xiii) Punitive Damages (Compl., at ¶¶ 559-65). As set forth herein, the Complaint should be dismissed in its entirety.

In the Complaint, Plaintiffs allege that the global pandemic caused by SARS-CoV-2—the virus that causes COVID-19 disease, which Plaintiffs purport was designed in, created in, and released from, the Wuhan Institute of Virology ("WIV") in China—is due solely to Defendants' actions and, as such, they should be held liable in tort and pay damages for deaths, along with related injuries, stemming therefrom. Plaintiffs contend liability exists on the theory that EcoHealth Alliance's receipt of National Institutes of Health ("NIH") grant funds gave rise to a duty to protect the public at large and that EcoHealth Alliance breached that duty by allegedly directing the WIV to continue risky and dangerous gain of function ("GOF") research that created a genetically modified coronavirus, SARS-CoV-2, that could jump species, escaped from the WIV laboratory, and infected Plaintiffs causing them to develop COVID-19 disease. (*See* Compl., at, ¶¶ 145-166).

First, the Complaint should be summarily dismissed because it does not allege a plausible claim for relief or otherwise is factually frivolous. New York courts have long rejected and/or summarily dismissed claims based on COVID-19 conspiracy theories, including claims based on the specific allegation that SARS-CoV-2 escaped from a research laboratory in Wuhan, China. The Court should take judicial notice that all research projects funded by the NIH are peer-reviewed prior to the award and all research grant recipients are subject to meticulous and routine reporting obligations that include, *inter alia*, express approval of proposed research, regular reports regarding ongoing research, and submission of financial documents to corroborate the appropriate use of grant funds. Here, Plaintiffs' conclusory allegation that EcoHealth Alliance somehow secretly engaged in dangerous, unauthorized, and unreported research creating SARS-CoV-2 simply does not pass the standard of plausibility under New York law and should be dismissed.

At a minimum, the Complaint must be dismissed, in its entirety, as stated against the individual Defendants, Daszak (Compl., at ¶¶ 49-54) and Cottingham (Compl., at ¶¶ 55-61), against whom the Complaint fatally lacks any allegations of specific misconduct that would subject Daszak and Cottingham to personal liability. Other than a description of Daszak and Cottingham's respective professional and personal connection to Defendant EcoHealth Alliance, Daszak as its President and Cottingham as Duszak's wife, the Complaint omits any specific allegations of tortious conduct by either Daszak and/or Cottingham to support an indication that they should be subject to liability for negligence or any of Plaintiffs' other alleged claims.

Regarding Plaintiffs' first, second, and fourth causes of action for negligence, gross negligence, and NIED, which allege that Defendants and others breached a purported duty (based on Defendants' alleged contractual and/or regulatory obligations in connection with the research grant) to protect Plaintiffs from the risk of exposure to SARS-CoV-2, the Complaint fails to state a cause of action. Under New York law, allegations of negligent or grossly negligent performance of a contract are not cognizable. Moreover, New York law does not recognize a duty to the public at large and explicitly disclaims the existence of a duty where the theory of the case would subject the Defendant to virtually unlimited liability to an indeterminate class of Plaintiffs. Here, given Plaintiffs' failure to allege a reasonable nexus between the parties and/or a basis to impose a duty other than a general duty to the public, the Complaint fails to state a cause of action sounding in negligence and must be dismissed.

Similarly, Plaintiffs' purported claim for negligent failure to warn, which is not an independent cause of action under New York law, must also fail as Plaintiffs fail to allege a special relationship between each of the Plaintiffs and the Defendants that gave rise to a duty to warn.

Plaintiffs' strict liability claim, which is mutually exclusive with Plaintiffs' negligence

claims, must also fail based on Plaintiffs' contradictory factual allegation that the alleged harms were avoidable. Other elements are also absent including allegations of a high degree of intrinsic risk in Defendants' coronavirus research. Rather, Plaintiffs readily admit that such research had been ongoing, safely, for many years. Regardless, public policy favoring research to prevent future pandemics and the spread of infectious diseases mitigate against recognition of potential liability based on the purported facts alleged in the Complaint.

As for Plaintiffs' claims for intentional tort, including IIED, assault and battery, and civil conspiracy, Plaintiffs fail to allege specific intentional conduct by Defendants directed at the Plaintiffs. These claims are also time-barred in light of the one-year statute of limitations for intentional torts. Plaintiffs' civil conspiracy claim also fails on the grounds that New York law does not recognize any such claim.

Plaintiffs' alleged claims for wrongful death and survival action, similar to conspiracy, also fail on the grounds that Plaintiffs fail to plead a viable underlying tort claim which is an essential element of wrongful death, survival action and conspiracy. Such claims are also subject to dismissal because of the intervening acts and causes alleged in the Complaint, by way of which Plaintiffs' were allegedly exposed to SARS-CoV-2. As a matter of law, a plaintiff cannot succeed on one of these claims without proof of a direct connection between the acts of the defendants and the injury to the plaintiffs, and here no such direct connection is alleged or capable of proof.

Accordingly, as set forth in more detail herein, Defendants' motion to dismiss the Complaint should be granted and the Complaint should be dismissed in its entirety as against all Defendants, with prejudice.

STATEMENT OF FACTS

In support of the Motion,[2] Defendants submit herewith and respectfully refer this Court to the Complaint, the Affirmation of Matthew R. Torsiello, dated February 21, 2023 (the "Torsiello Affirmation" or "Torsiello Aff."), the Affidavit of Peter Daszak, sworn to April 4, 2022 (the "Daszak Affidavit" or "Daszak Aff."), and the documents annexed thereto for a full and complete recitation of the relevant facts. While facts alleged in the Complaint are assumed to be true for purposes of the Motion, conclusory allegations and allegations contradicted by document evidence are neither assumed true nor entitled to the benefit of any favorable inference. Any capitalized terms used herein and not otherwise defined have the same meaning ascribed to them in the Complaint, the Torsiello Aff., and the Daszak Aff. this is a motion to dismiss the pleadings,

In sum, Plaintiffs allege that Defendants, in collaboration with the WIV and others, created SARS-CoV-2, the virus that causes COVID-19 disease, and caused it to escape from the WIV by failing to maintain appropriate bio-safety protocols contained in the terms and conditions of the Notices of Awards for the Project and in the NIH Grants Policy Statement. Plaintiff further claims that Defendants conspired with WIV researchers to continue dangerous GOF [gain of function] research" in unsafe environments, which led to the COVID-19 pandemic. (Compl., at ¶¶ 152-54).

A. EcoHealth Alliance, Inc.

EcoHealth Alliance is a prominent New York-based not-for-profit institution dedicated to protecting the health of people, animals, and the environment from emerging zoonotic diseases. For more than a decade, EcoHealth Alliance has been conducting cutting edge scientific research to identify hundreds of new coronaviruses in bats and to study the capacity of these viruses to infect human cells. The purpose of this research is to identify high risk populations so international

[2] A copy of the Complaint is attached to the Torsiello Aff. as **Exhibit A**.

actors can leverage their resources to address potential pandemics. (Compl., at ¶¶ 92-97).

In cooperation with a global network of over seventy partners, including academic institutions, intergovernmental and governmental agencies, infectious disease surveillance laboratories, and other national and international organizations in over thirty countries, EcoHealth Alliance's work has led to numerous scientific papers that have been critical in raising awareness of the threat that coronaviruses pose for global health, the global economy, and U.S. National Security. (Compl., at ¶ 88).

B. The National Institutes of Health

The NIH is the primary Federal agency that conducts and supports medical research. The NIH funds grants, cooperative agreements, and contracts that support the advancement of fundamental knowledge about the nature and behavior of living systems. Approximately eighty percent of NIH funding goes to support research grants, including grants and subawards to support research conducted outside the United States. NIH must manage and administer Federal awards to ensure that Federal funding is expended, and associated programs are implemented, in full accordance with statutory and public policy requirements. (Compl., at ¶ 158).

EcoHealth Alliance has a long history of successful cooperation with the NIH including multiple Research Project Grant R01 awards. In particular, Peter Daszak, EcoHealth Alliance's President, and Chief Scientist, has been the Principal Investigator on five multidisciplinary R01s. All of these projects used modeling, epidemiology, laboratory, and field science to test hypotheses on the emergence of wildlife-origin viral zoonoses, including SARS-CoV, the Nipah and Hendra viruses, Avian influenza, and other bat-origin viruses. (Compl., at ¶¶ 197-99).

C. The Research Project

In 2014, NIH issued EcoHealth Alliance a five-year NIH award for the Project, *Understanding the Risk of Bat Coronavirus Emergence* (the "Project"), funded under grant 1R01

AI 110964-1. EcoHealth Alliance received additional awards for the Project each year between 2015 through 2019. (Daszak Aff., ¶¶ 4-8). As the Principal Investigator on the Project, Daszak was responsible for overseeing the Project, general management, communication, and collaboration with sub-awardees, as well as contributing to data analysis and writing. (Compl., at ¶ 163).

D. The WIV Subcontracts

The Notices of Awards for each annual budget period, from 2014 through 2019, included an allocation of funds for subcontract activity between EcoHealth Alliance and the Wuhan Institute of Virology ("WIV"), which had been approved by the NIH. The WIV was chosen, in part, because, as the Complaint acknowledges, "the WIV hosts labs ranging from BSL-2 to BSL-4, which is the highest level of biosafety containment." (Compl., at ¶ 104).

Under the terms and conditions of the Notices of Awards, and the terms and conditions of the NIH Grants Policy Statement, for each year between 2014 and 2019, EcoHealth Alliance executed an appropriate Subcontract or Consultation Agreement with the WIV (together, the "Subcontracts") that detailed the work that was being performed by the WIV in connection with the Project. (Daszak Aff., ¶¶ 11-16). In each of the Subcontracts, EcoHealth Alliance's co-investigator at the WIV, Zhengli Shi, agreed that the WIV would provide, *inter alia*, coordination of research, oversight, and implementation of activities. (Compl., at ¶¶ 157, 161).

E. The NIH Renewal Grant

In 2019, EcoHealth Alliance submitted a renewal application to NIH, through the NIAID, to extend the Project for an additional five years. Upon filing of its renewal application, the Project was ranked as an "extremely high priority" (in the top 3%) by NIAID during its external review process. In light of its success and the importance of EcoHealth Alliance's work, on July 24, 2019, NIH reauthorized grant R01AI110964 and issued a Notice of Award that increased EcoHealth

Alliance's funding and extended the Project period by an additional five years, through 2024. (Daszak Aff., at ¶¶ 17-19).

F. The COVID-19 Pandemic

During the pendency of the Project, in December of 2019, China reported a cluster of cases of pneumonia in Wuhan, Hubei Province. It was later determined that the cause of this pneumonia was a novel coronavirus, SARS-CoV-2, causing coronavirus COVID-19 disease. Thereafter, SARS-CoV-2 spread to nearly every country throughout the world (the "Pandemic"). The prevailing scientific theory is that SARS-CoV-2 originated in horseshoe bats and was passed through an intermediate host to humans. (Compl., at ¶¶ 308-09). At the time that the pandemic was unfolding, between November 2019 and March 2020, EcoHealth Alliance did not have an active Subcontract agreement to perform research at the WIV. (Daszak Aff., at ¶¶ 22-23).

G. The Plaintiffs

Plaintiffs are principally representatives of the estates of deceased natural persons who were allegedly exposed to SARS-CoV-2 and developed symptoms of COVID-19 disease causing personal and economic injuries. Plaintiffs attribute their injuries to, *inter alia*, Defendants' purported failure to ensure appropriate safeguards at the WIV and the intentional performance of dangerous and unauthorized GOF research causing the creation and release of the SARS-CoV-2 virus. Plaintiffs further allege that Defendants conspired to spread misinformation and to prevent the timely and accurate disclosure of the true origins and threat of the SARS-CoV-2 coronavirus. (Compl., at ¶ 53).

As set forth in detail herein, Plaintiffs' allegations in the Complaint fail to state a cause of action for gross negligence, negligence, abnormally dangerous activity, and/or public nuisance and, therefore, the Amended Complaint should be dismissed, in its entirety.

ARGUMENT

I. STANDARD OF LAW

The Court of Appeals has long held, in determining whether a complaint is sufficient to withstand a motion pursuant to CPLR R. 3211(a)(7), that "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274 (1977). As the Court of Appeals more recently articulated in *Godfrey v. Span*, 13 N.Y.3d 358 (2009), while the allegations in the complaint are accepted as true when considering a motion to dismiss—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Id.*, 13 N.Y.3d at 373. Moreover, "wholly conclusory assertions are insufficient to support a cause of action." *Welsh v. Haven Manor Health Care Ctr.*, 15 A.D.3d 572 (2d Dept. 2005); *Moskowitz v. Gen. Acc. Ins. Co.*, 179 A.D.2d 722 (2d Dept. 1992).

It is well-settled that "[o]n a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and are accorded every favorable. inference. However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v. Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 A.D.2d 233, 233-234 (1st Dept. 1994). In addition, "the allegations in the complaint cannot be vague and conclusory." *Stoianoff v. Gahona*, 248 A.D.2d 525 (2d Dept. 1998).

Moreover, purported factual allegations that are no more that speculative presumptions are not entitled to the benefit of the presumption of truth, are not to be accorded every favorable inference, and therefore, cannot survive a motion to dismiss for failure to state a cause of action pursuant to CPLR R. 3211(a)(7). *See LoPresti v. Mass. Mut. Life Ins., Co.*, 30 A.D.3d 474, 475

(2d Dept. 2006); *Maitlin Patterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dept. 2011) (the "the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.").

CPLR § 3013, entitled "Particularity of statements generally," requires that "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." CPLR R. 3014 further requires that "each paragraph [of the pleading] shall contain, as far as practicable, a single allegation." New York Courts have held that where "defendants have strained to read meaning into a plaintiffs' complaint in order to assert defenses and bars to maintenance of the actions... plaintiff has not satisfied the first requirement of pleading facts which give notice of the transactions or occurrences intended to be proved, [thus] there are no facts against which to apply the second requirement of whether the alleged facts state a cognizable cause of action." *Jackson v. Bank of N.Y. Mellon*, 33 Misc.3d 1208(A) (Sup. Ct. Kings Co. 2011); s*ee also* CPLR § 3013, CPLR R. 3014, and CPLR R. 3016. Here, Plaintiffs' Complaint here consists of bare legal conclusions with no factual specificity to support the purported claims and, rather provides a voluminous narrative of irrelevant information, which is insufficient to survive a motion to dismiss.

In addition, CPLR R. 3211(a)(1) allows the court to dismiss an action where "a defense is founded upon documentary evidence." Specifically, "[p]ursuant to CPLR 3211(a)(1), where the 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,' dismissal is warranted." *Excel Graphics Techs., Inc. v. CFG/AGSCB 75 Ninth Ave., LLC*, 1 A.D.3d 65, 69 (1st Dept. 2003) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994)). "It bears noting that '[w]hile a complaint is to be liberally construed in favor of plaintiff on a CPLR

3211 motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence."' *Id.* at 69 (internal citations omitted). As such, where a clear written agreement or document precludes the possibility of relief, a court must dismiss the complaint "without looking to extrinsic evidence ... not present on the face of the document." *150 Broadway NY. Assocs., LP v. Bodner*, 14 A.D.3d 1, 6 (1st Dept. 2004); *see also R/S Assocs. v. NY Job Dev. Auth.*, 98 N.Y.2d 29, 33 (2002); *Sunset Café, Inc. v. Mett's Surf & Sports Corp.*, 103 A.D.3d 707 (2d Dept. 2013).

It is well established that a written contract constitutes "documentary evidence" sufficient to bar claims under CPLR R. 3211(a)(1) (*Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship*, 221 A.D.2d 248 (1st Dept. 1995)), and that exculpatory provisions in such contracts are enforceable (*Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341 (1998); *Lago v. Krollage*,1995)), and that exculpatory provisions in such contracts are enforceable (*Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341 (1998); *Lago v. Krollage*, 78 N.Y.2d 95, 99-100 (1991)). In fact, courts routinely grant motions to dismiss pursuant to CPLR 3211(a)(1) when defendants submit documentary evidence that bars the purported claims alleged and/or prohibits the relief sought by the plaintiffs, as described below.

II. PLAINTIFFS' COMPLAINT SHOULD BE SUMMARILY DISMISSED BECAUSE IT DOES NOT ALLEGE A PLAUSIBLE CLAIM FOR RELIEF AND IS OTHERWISE IS FACTUALLY FRIVOLOUS

At the outset, Defendants contend that the Complaint should be summarily dismissed because it does not allege a plausible claim for relief or otherwise is factually frivolous. Plaintiffs' conspiratorial allegations are reminiscent of allegations such as by April Gallop in the action *Gallop v. Cheney*, regarding the attacks on the World Trade Center in New York City on September 11, 2001. *Gallop v. Cheney*, 642 F.3d 364 (2d Cir. 2011) (complaint by citizen against senior government officials, claiming they had conspired to cause the September 11, 2001, attacks against

the United States, was subject to dismissal for failure to state a claim, where it was based on unsupported and inconsistent assumptions, and any well pleaded facts were clearly baseless, *i.e.*, they were fanciful, fantastic, or delusional).[3] Here, Plaintiffs attempt to marshal a series of unsubstantiated and inconsistent allegations to prove a conspiracy involving Defendants, their research partners, and others, to cover-up Defendants' purported creation of SARS-CoV-2. The allegations based on wholly unrelated circumstances and events utterly fails to set forth a consistent, much less plausible, theory for what actually caused SARS-CoV-2 to jump to humans. On this basis, standing alone, the Complaint should be dismissed in its entirety.

III. THE COMPLAINT FAILS TO ALLEGE ANY BASIS FOR INDIVIDUAL LIABILITY AGAINST COTTINGHAM AND DASZAK

Plaintiffs fail to plead causes of action for individual or personal liability against Daszak and Cottingham for negligence and gross negligence. First, the Complaint fails to plead any non-conclusory allegations of conduct by Cottingham. Cottingham is barely mentioned in the Complaint (Compl., at ¶¶ 55-61), and, significantly, Plaintiffs do not plead that Cottingham is an either an employee of EcoHealth Alliance (which she is not) or that she had any connection to WIV in the Fall of 2019 when Plaintiffs claim the SARS-CoV-2 virus was accidentally created and released. *See* *Kaufman v. Cohen*, 307 A.D.2d 113, 126 (1st Dept 2003) (a claim for aiding and abetting requires a primary wrongdoing, knowledge, and substantial assistance). Plaintiffs instead allege in conclusory fashion that Cottingham "aided and abetted Daszak and EcoHealth Alliance's

[3] Multiple New York courts have rejected, or summarily dismissed, claims based on COVID-19 conspiracy theories. *See Strunk v. Warren County Sheriff's Dept.*, Index No. EF2021-69455 (Sup. Ct. Warren Co. Mar. 30, 2022) (dismissing petition as speculative and inherently incredible, where petitioner sought injunction barring distribution of the COVID-19 vaccine, alleging a conspiracy to conduct unlawful scientific experiments on human subjects through administration of the vaccine); *see also* *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, No. 21-32-cv, 2022 WL 852293 (2d Cir. Mar. 23, 2022) (affirming district court, which held, *inter alia*, "[i]t cannot be seriously disputed that the COVID-19 pandemic is a natural disaster," and rejecting contention that "whether COVID-19 escaped from one of two labs in Wuhan working on coronaviruses" was an open question of material fact that required additional discovery).

acts and omissions in furtherance of" securing grants and the alleged failure to comply with grant terms and conditions and/or monitor EcoHealth Alliance's subcontractor, the WIV. Such allegations, which are devoid of any specific acts on the part of Cottingham or Daszak, fall short of well-established pleading standards and, thus, fail to state a cause of action sufficient to survive a pre-answer motion to dismiss. Regardless, Plaintiffs fail to allege, in any fashion, that Cottingham owed a duty to Plaintiffs, how that duty was breached, and/or how Plaintiffs were otherwise damaged by any intentional or negligence act by Cottingham or Daszak.

Because Plaintiffs fail to plead essential elements of a claim for individual liability for negligence against Cottingham and Daszak, the Complaint must be dismissed in its entirety as against the individual Defendants. *See* *Shapolsky v. Shapolsky*, 22 A.D.2d 91, 94 (1st Dept. 1964) ("while the complaint puts the defendants on notice that the plaintiff has some grievances against the corporations and the individuals, it fails to give notice of the material elements of each cause of action…and it should therefore be dismissed.").

In addition, with respect to Daszak, "[t]he status of a director, in and of itself, does not impose liability; the plaintiff must also establish either that the director participated in the [wrongful] act or suffered it to be permitted with actual knowledge of its occurrence, or with imputable knowledge arising from the failure to exercise ordinary prudence in ascertaining facts a diligent director would know." *Van Schaick v. Aron*, 70 Misc. 520 (Sup. Ct. N.Y. Co. 1938). Significantly, nowhere in the five hundred and sixty-five paragraph Complaint, or in the exhibits attached thereto, do Plaintiffs provide a single example of a particular act by Daszak that could be construed as the breach of a legally cognizable duty to Plaintiffs. Plaintiffs' repeated conclusory allegations, without more, fail to state a claim and are insufficient to survive dismissal.

In a similar case involving a plaintiff's challenge to the eligibility of President Obama to

serve as president under "birther" conspiracy theories, the court held that the plaintiff's complaint was "more of a political manifesto than a verified pleading" and summarily dismissed the plaintiff's spurious claims, and sanctioned the plaintiff. *See* *Strunk v. N.Y.S. Bd. of Elections*, 39 Misc 3d 1203(A) (Sup. Ct. Kings Co. Apr. 11, 2012) ("complaint must be dismissed because the 'Court need not, and should not, accept legal conclusions, unwarranted inferences, unwarranted deductions, baseless conclusions of law, or sweeping legal conclusions cast in the form of factual allegations'"). Here, the same conclusion, and dismiss of the Complaint, is thoroughly warranted.

IV. PLAINTIFFS' NEGLIGENCE CLAIMS (COUNTS I, II, IV, VI, X, AND XI) MUST BE DISMISSED BE DISMISSED IN THEIR ENTIRETY ON VARIOUS GROUNDS

Plaintiffs' claims sounding in negligence including the following causes of action: negligence (Count I); gross negligence (Count II); negligent failure to warn (Count IV); and negligent infliction of emotional distress (Count VI), all fail as a matter of law due to Plaintiffs failure to sufficiently allege a duty Defendants owed to the Plaintiffs.

A. As A Matter Of Law, Plaintiffs' Negligence Claims Fails To Sufficiently Allege A Duty Owed To Plaintiffs, As Required

It is a fundamental principle of tort law that a plaintiff in a negligence claim "must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016) (internal quotations omitted). The question of whether Defendants owe a legally recognized duty of care to Plaintiffs is the "threshold question in any negligence action" (*Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001)), and it is a legal question for the court. *Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015) ("The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is one of law for the courts."). As a matter of law, "[i]n the absence of a duty … there can be no liability." *Pasternack*,

27 N.Y.3d at 825. That is, if Defendants owe no duty to a Plaintiffs, such as here, "there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v. City of N.Y.*, 95 N.Y.2d 95, 100 (2000) New York courts often refrain from "expanding traditional tort concepts beyond manageable bounds" as doing so would "create an almost infinite universe of potential plaintiffs" to impose a duty on a defendant to the "community at large[.]" *Ellis v. Peter*, 211 A.D.2d 353 , 353 (2d Dept. 1995) (internal citations and quotations omitted).

The Complaint advances conclusory arguments of Defendants' purported duty to the Plaintiffs "to protect them from the risks of exposure to SARS-CoV-2, because Defendants were in the best position to protect against the risk of harm that resulted in damages to each of the Plaintiffs but fails to allege any direct connection between themselves and the complained of conduct taken by Defendants. (Compl., at ¶ 445). Plaintiffs try sidestepping this glaring omission by alleging that Defendants owed a duty to the public at large, including the Plaintiffs, to conduct research at WIV under an appropriate biosafety level while implementing proper protective measures. (Compl., at ¶ 446). In addition, Plaintiffs allege that Defendants were negligent in failing to immediately warn Plaintiffs about the release of SARS-CoV-2 at the WIV. Conspicuously absent from the Complaint, are any allegations that Plaintiffs had any direct contact or communications with any of the Defendants whatsoever before Plaintiffs were allegedly exposed to the virus, or that Plaintiffs otherwise had any type of special relationship with the respective No Defendants. As a matter of law, and in the absence of any specific duty owed to Plaintiffs, the negligence claims must be dismissed. *See Mongello v. Davos Ski Resort*, 224 A.D.2d 502, 502 (2d Dept. 1996) (affirming dismissal of complaint under CPLR R. 3211(a)(7) for failing to allege facts sufficient to give rise to a duty); *Sheila C. v. Povich*, 11 A.D.3d 120, 125-26 (1st Dept. 2004) (granting dismissal as allegations in complaint did not support the existence of a duty owed).

B. Purported Allegations That Defendants Owed a Duty to the "Public at Large," Does Create Not the Requisite Direct Duty Required Nor Does it Salvage the Complaint From Dismissal

"The question of whether a member or group of society owes a duty of care to reasonably avoid injury to another is of course a question of law for the courts." *Tenuto v. Lederle Lab'ys, Div. of Am. Cyanamid Co.*, 90 N.Y.2d 606, 612 (1st Dept 1997) (quotation omitted); *Pulka v. Edelman*, 40 N.Y.2d 781 (1976). "Courts resolve legal duty questions by resort to common concepts of morality, logic and consideration of the social consequences of imposing the duty." *Tenuto*, 90 N.Y.2d at 612 (quotation omitted); *See also De Angelis v. Lutheran Med. Ctr.*, *Tenuto*, 90 N.Y.2d at 612 (quotation omitted); *See also De Angelis v. Lutheran Med. Ctr.*, 58 N.Y.2d 1053, 1055 (2d Dept. 1983) ("In fixing the bounds of that duty, not only logic and science, but policy play an important role."). "The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for '[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm'" *Hamilton*, 96 N.Y.2d at 232 (quotation omitted).

Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994). "The key consideration[s] critical to the existence of a duty in these circumstances is that the defendant's relationship with [] the plaintiff places the defendant in the best position to protect against the risk of harm[.]" *In re New York City Asbestos Litig.*, 5 N.Y.3d 486, 494 (2005) (internal quotation marks and citation omitted), and that "the

specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship." *Hamilton*, 96 N.Y.2d at 233.

In the instant case, Plaintiffs do not allege that they had any direct contact with Defendants that would make their collective exposure to SARS-CoV-2 a foreseeable harm of Defendants' purported failure to ensure that WIV maintained unspecified protective measures in its biosafety laboratories. *See Swade v. Nassau Valve & Supply Corp.*, 288 A.D.2d 370, 371 (2d Dept. 2001) (before a defendant may be held liable for its alleged negligence, it must be demonstrated that it "has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff"). Absent knowledge and awareness of a foreseeable harm to Plaintiffs, Defendants were not in the best position to prevent harm to Plaintiffs. *See Chunhye Kang-Kim v. City of N.Y.*, 29 A.D.3d 57 (1st Dept 2006) (speculative testimony regarding how an incident "could have" been prevented is insufficient to demonstrate negligence); *Gaige v. Kepler*, 303 A.D.2d 626, 627 (2d Dept. 2003) (holding "[c]ontrary to the plaintiff's contention, foreseeability of injury does not alone determine the existence of duty" in affirmance of the trial court's dismissal of plaintiff's negligence action.)

Under such circumstances, the extension of a duty from Defendants to Plaintiffs would result in the uncontrollable "proliferation of claims, the likelihood of unlimited or insurer-like liability, [and] disproportion risk and reparation allocation." *In re New York City Asbestos Litig.*, 5 N.Y.3d at 493; s*ee also Lauer*, 95 N.Y.2d at 100 (in determining whether a duty exists, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.") (internal quotation and citations omitted); *Gillette Shoe Co. v. City of N.Y.*, 86 A.D.2d 522, 523-24 (1st Dept 1982) (holding that the City of New York was not liable for damages resulting from a burst watermain installed seventy-five years beforehand on a negligence theory that the water main break was caused by an attack of anaerobic

bacteria upon pipe material and city's failure to test for or discover the presence of the bacteria); *Malone v. Cnty. of Suffolk*, 128 A.D.3d 651, 653 (2d Dept. 2015) (reversing denial of a motion to dismiss where the plaintiff failed to allege specific circumstances so as to impose a duty on the defendant, because "[t]he decedent was a stranger [omitted] and a member of the general public, not a member of 'a determinate and identified class'").

The allegations in the Complaint, if allowed to survive dismissal, would expose the Defendants to infinite liability for a once in a century pandemic and the deaths of over a million persons.[4] As seen by the Second Department opinions in *Malone* and *Ellis*, New York courts will not impose a duty on a defendant where liability would thereby be owed to an unruly and indeterminate class of plaintiffs. *See Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 307 (2d Dept. 1994) ("there is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree."). Here, allowing Plaintiffs' claims to proceed would both open expand potential liability to a degree that no similarly situated person could mitigate or protect against that risk, but also expand the scope of duty to a class of plaintiffs where the defendants had real world tangible or traceable connection to those plaintiffs whatsoever. Such a theory fails to state a cause of action as a matter of law.

C. Plaintiffs Do Not Allege a Special Relationship Which is Essential to Negligence Claim Based on A Failure To Warn

Plaintiffs do not allege any unique or special relationship between themselves and Defendants sufficient to impose a duty on Defendants to warn Plaintiffs. The holding in *Ellis,* is instructive (211 A.D.2d 353 , 353 [2d Dept. 1995]). In *Ellis*, the plaintiff sued her husband's

[4] Johns Hopkins Coronavirus Resource Center – U.S. Map (https://coronavirus.jhu.edu/us-map) (last accessed February 21, 2023).

physician, alleging that the physician breached a duty of reasonable care by failing to warn her about her husband's infectious condition (tuberculosis). *Ellis*, 211 A.D.2d 353. Ultimately the Second Department reversed the trial court's decision to deny the physician's motion to dismiss based on a lack of relationship between the parties, because of a concern as to when the physician's duty would end if it extended past the physician's actual patient:

> Nevertheless, were we to extend the defendant's duty of care to the wife under these circumstances, *we perceive no demarcation of the point where that duty would end*. In other words, if the physician owes a duty to a patient's spouse to warn her about his patient's condition, such a duty would also logically extend to other individuals with whom the patient was in close contact, such as other relatives, e.g., his children, co-workers, or even fellow commuters. Clearly such individuals represent the "community at large" to whom a physician owes no duty of care.

Id. (emphasis added)

Here, Plaintiffs make no distinction between themselves and every other individual who developed COVID-19 after exposure to SARS-CoV-2. Instead, Plaintiffs rely on generalized allegations of a purported breach of duty by the Defendants to urge the Court to impose one (Compl., at ¶ 445), while containing contradictory allegations that acknowledge that such a duty would be extended to the public at large. (*See* Compl., at ¶ 499 ["Defendants and their co-conspirators… negligently failed to advise Plaintiffs, Decedents, and the general public of the serious health consequences associated with the lab-made SARS-CoV-2 virus."]). Absent specific allegations of a special relationship, based on direct association, between the Defendants and each of the individual Plaintiffs, the Complaint fails to state a cause of action for negligence based on a failure to want and, accordingly, Plaintiffs' claim for negligent failure to warn must be dismissed.

D. New York Does Not Recognize a Cause of Action for Medical Monitoring

New York does not recognize an independent cause of action for medical monitoring. *Tsakis v. Keyspan Corp.*, 176 A.D.3d 1003, 1005, 111 N.Y.S.3d 370, 372 (2d Dept. 2019); citing

Caronia v. Philip Morris USA, Inc., 22 N.Y.3d 439, 452, 5 N.E.3d 11, 18–19 (2013) (*concluding* "that the policy reasons set forth above militate against a judicially-created independent cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence."). Accordingly, Plaintiffs' eighth cause of action must be dismissed.

V. THE COMPLAINT FAILS TO STATE A CLAIM AGAINST DEFENDANTS FOR STRICT LIABILITY (COUNT III)

Plaintiff asserts a theory of liability for strict liability by virtue of Defendants' alleged engagement in "abnormally dangerous activity." New York courts consider the following factors in determining whether an activity is abnormally dangerous: (1) existence of a high degree of risk of some harm to the person, land or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes. *See* *Kowalski v. Goodyear Tire and Rubber Co.*, 841 F. Supp. 104, 109 (W.D.N.Y. 1994); Restatement (Second) of Torts, § 520.

Plaintiffs' claim of strict liability is mutually exclusive to his claim for negligence. Inasmuch as Plaintiffs alleges that EcoHealth Alliance's contractor, WIV, ignored biosafety and biosecurity standards in performing its work, Plaintiffs fails to adequately allege that the activity was abnormally dangerous. If the risk could be eliminated by the exercise of reasonable care (as Plaintiffs allege), Plaintiffs cannot establish that the activity was abnormally dangerous. Indeed, by accepting the allegations in the Complaint as true, Plaintiffs have alleged both that Defendants failed to exercise reasonable care and that the risk existed regardless of whether Defendants exercised reasonable care.

Turning to the remaining factors, Plaintiffs cannot establish that there was a high degree of risk of some harm to others, nor can Plaintiffs establish that the likelihood of harm that would result was great. Further, while medical research is not as common as driving a car, it is carried out on a daily basis around the world. Plaintiff cannot establish that the research was performed in a location that was "inappropriate" to the place where it was carried on. Indeed, as demonstrated through the Amended Complaint and the attachments thereto, the research was carried out at the WIV, China's premier biosafety laboratory, in biosafety labs ranging from level 2-4. (Compl., at ¶ 104). This is a completely appropriate location for carrying out biomedical research.

Finally, and most importantly, the value of EcoHealth Alliance's research to the community is not outweighed by its dangerous attributes. *See, e.g.*, *In re Brookhaven Nat'l Lab'y Trichloroethylene Cases*, 511 F. Supp. 3d 374, 392 (E.D.N.Y. 2020) (finding that use of carcinogenic chemical in lab was not ultrahazardous activity given "value to the community" of the work of Brookhaven National Laboratory). If the value of the research was so dangerous, NIH would never have permitted the grant to move forward in the first place. It is indisputable that determining where the next zoonotic disease will come from and studying coronaviruses, and other infectious diseases, is extremely valuable to the community and society at large. In fact, to impose strict liability in such a situation would have devastating effects on science and medical research, deterring individuals and organizations from performing novel research for fear of being subjected to unlimited liability to an unascertainable class of persons. Thus, Plaintiffs cannot establish that Defendants engaged in an abnormally dangerous activity, as a matter of law, and Plaintiffs' strict liability claim should be dismissed.

VI. THE AMENDED COMPLAINT DOES NOT PLEAD FACTS TO SHOW THAT DEFENDANTS COMMITTED AN INTENTIONAL ACT OF AN UNREASONABLE CHARACTER IN DISREGARD OF A KNOWN AND OBVIOUS RISK AND THUS FAILS TO STATE A CLAIM FOR GROSS NEGLIGENCE (COUNT II)

"[G]ross negligence requires "a reckless disregard for the rights of others, bordering on intentional wrongdoing." *Horowitz v. Camelot Associates Corp.*, 66 A.D.3d 1299, 1302 (3d Dept 2009). Gross negligence is ""different in kind and degree" from ordinary negligence." *Lemoine v. Cornell University*, 2 A.D.3d 1017, 1020 (3d Dept 2003). "It is conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrongdoing." *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.*, 81 N.Y.2d 821, 823 (1993).

Here, the Plaintiffs fail to plead specific facts, not just conclusory rhetoric, showing that Defendants have intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and that Defendants did so with conscious indifference to the outcome. Plaintiffs do not provide a single example of a particular safeguard that was overlooked or ignored by Defendants. Accordingly, Plaintiffs' claim for gross negligence should be dismissed.

VII. CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (COUNT V), ASSAULT AND BATTERY (COUNT VII), AND CIVIL CONSPIRACY (COUNT IX) MUST BE DISMISSED

Plaintiffs' fifth, seventh, and ninth causes of action for IIED, assault and battery, and civil conspiracy, are all readily dismissible due to the Complaint's inability to set forth sufficient allegations as to the Defendants' conduct, amongst other deficiencies. Further, the Complaint contains a separate cause of action for punitive damages, but New York is clear that a demand for punitive damages does not constitute a separate cause of action.[5] As will be demonstrated below,

[5] *See Rimany v. Town of Dover*, 72 A.D.3d 918, 923 (2d Dept. 2010) ("a demand for punitive damages may not constitute a separate cause of action for pleading purposes").

the Complaint is riddled with deficiencies, such as these, which make it suitable for dismissal. Moreover, the one-year statute of limitations for intentional torts (CPLR § 215), renders all the claims hereunder untimely and subject to dismissal. *See e.g.*, *De La Cruz v. Nour*, 134 A.D.3d 883, 885 (2d Dep't 2015); *Mi-Kyung Cho v. Young Bin Cafe*, 42 F. Supp. 3d 495, 510 (S.D.N.Y. 2013); *Wilkerson v. 134 Kitty's Corp.*, 49 A.D.3d 718 (2d Dep't 2008).

A. The Intentional Infliction of Emotional Distress (Count V) Claim Fails

To state a cause of action for IIED, a plaintiff must establish four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *Taggart v. Costabile*, 131 A.D.3d 243, 249 (2d Dept. 2015). Moreover, "the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so 'as to be regarded as atrocious and intolerable in a civilized society.'" *Leonard v. Reinhardt*, 20 A.D.3d 510, 510 (2d Dept. 2005) (quoting *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985)). Here, the Complaint falls short of satisfying the requirements to sustain an IIED claim. Curiously, Plaintiffs acknowledge that the goal of Defendants' research activities "was to develop a universal vaccine that could be used for many different types of coronaviruses." (Compl., at ¶ 97). This concession, however, warrants dismissal, because "[u]nder New York law, as the conduct alleged to support an IIED must be 'intentionally directed at the plaintiff and lack any reasonable justification.'" *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F. Supp. 1033, 1048 (S.D.N.Y. 1993) (citing *Green v. Leibowitz*, 118 A.D.2d 756, 757 (2d Dept. 1986)) (reversing trial court's denial of defendants' motion to dismiss IIED claim when "plaintiff's factual allegations [failed to] support a claim that the defendants' conduct was especially calculated to cause emotional distress) (internal quotations omitted). As the Complaint goes insofar to allege, Defendants conduct cannot be said to been directed at the Plaintiffs. Plaintiffs' claim for IIED,

which lacks any allegations describing how Defendants' conduct was aimed at causing the named Plaintiffs emotional distress, must "be dismissed since the requisite intent to cause [Plaintiffs] emotional distress [is] lacking." *Wiest v. Breslaw*, 8 A.D.3d 202, 203 (1st Dept. 2004).[6]

B. The Assault and Battery Claim (Count VII) Fails

"Assault is defined as an intentional attempt or threat to do injury or commit a battery.", and a "batter is [the] intentional and wrongful physical contact with a person without his or her consent." *Stanley v. Amalithone Realty, Inc.*, 31 Misc. 3d 995, 1006 (Sup. Ct. N.Y. Co. 2011). "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact." *Bastein v. Sotto*, 299 A.D.2d 432, 433 (2d Dept. 2002). Here, Plaintiffs do not allege that the Defendants intended to make bodily contact with the named Plaintiffs, *Stanley*, 31 Misc. 3d 995, 1006 (Sup Ct. N.Y. Co. 2011) (dismissing plaintiff's claim when "[n]o deliberate act was taken by defendants to make contact with plaintiff's person or property."), nor do Plaintiffs allege that they were in *imminent* apprehension of any harmful contact prior to their exposure to SARS-CoV-2. . *See Higgins v. Hamilton*, 18 A.D.3d 436 (2d Dept. 2005) ("The assault cause of action also was correctly dismissed because, according to the plaintiff's own testimony, she was not in imminent apprehension of any harmful contact before the decedent shot himself"). Accordingly, these claims must be dismissed.

C. The Civil Conspiracy (Count IX) Claim Fails

New York does not recognize an independent cause of action for civil conspiracy. *See Faulkner v. City of Yonkers*, 105 A.D.3d 899, 900 (2d Dept. 2013); *See Williams v. Williams*, 149

[6] Plaintiffs' IIED claim is simply duplicative of its causes of action for assault and battery. *See Leonard v. Reinhardt*, 20 A.D.3d 510, 510 (2d Dept. 2005) ("Here, the cause of action alleging intentional infliction of emotional distress should have been dismissed as duplicative of the causes of action alleging malicious prosecution and assault and battery").

A.D.3d 1145, 1146 (2d Dept. 2017). "In order to properly plead a cause of action to recover *damages* for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement[.]" *Perez v. Lopez*, 97 A.D.3d 558, 560 (2d Dept. 2012) (emphasis added). "[B]are conclusory allegation[s] of conspiracy [are] usually held insufficient." *Goldstein v. Siegel*, 19 A.D.2d 489, 492 (1st Dept. 1963). In the instant matter, Plaintiffs' civil conspiracy claim is, on its own, futile, and otherwise dependent on the survivability of one Plaintiffs' underlying tort causes of action, none of which are viable. Even if Plaintiffs could sustain a separate tort action – which they cannot – the claim for civil conspiracy must be dismissed, since the Complaint only contains vague and conclusory allegations as to the alleged conduct of the Defendants. (Compl., at ¶ 528 ("Defendants and their co-conspirators intentionally engaged in numerous overt acts in furtherance of their various agreements.")).

Accordingly, just as their negligence claims, Plaintiffs' claims sounding in intentional torts must also be dismissed.

VIII. THE CAUSES OF ACTION FOR WRONGFUL DEATH (COUNT X) AND SURVIVAL (COUNT XI) ARE DISMISSIBLE BECAUSE OF THE INTERVENING CAUSES DESCRIBED IN THE COMPLAINT

Plaintiffs' tenth and eleventh causes of action for "wrongful death" and "survival." The Complaint omits any non-conclusory allegations as to Defendants' conduct which caused the death of the Decedents. (Compl., at ¶ 536). A claim for wrongful death must establish (1) the death of a human being; (2) the wrongful act, neglect or default of defendant by which the decedent's death was caused; (3) the survival of distributes who suffered pecuniary loss by reason of the death of the decedent; and (4) the appointment of a personal representative of the decedent. *Chong v. N.Y.C. Tr. Auth.*, 83 A.D.2d 546, 547 (2d Dept. 1981). However, even in a wrongful death case,

speculation, guess and surmise may not be substituted for competent evidence, and where there are several possible causes of an accident, one or more of which a defendant is not responsible for, a plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which the defendant was responsible. *See* *Johnson v. Sniffen*, 265 A.D.2d 304, 304 (2d Dept. 1999) (internal citations and quotations omitted). Indeed, supervening events will relieve a defendant of liability in a wrongful death action. *See* *Est. of Morgana v. Staten Is. Hotel*, 140 A.D.3d 1113, 1114 (2d Dept. 2016). Here, the Complaint contains allegations that show intervening acts, all of which nullify the notion that Defendants were the cause of the Decedents' deaths. (*See* Compl., at ¶ 401 "[Decedent Dale Jones] remained stable in the hospital until August 13, 2022, when he was put on a ventilator and moved to ICU, put on a ventilator."). This reasoning can be extended to dismiss Plaintiffs' survival cause of action, which is similarly deficient because it contains allegations of superseding events which disrupt the casual chain between the alleged wrongful actions of the Defendants and the harm that befell the Decedents. *Van Valkenburgh v. Robinson*, 225 A.D.2d 839, 840 (3d Dept. 1996) ("It has long been the law that 'an intervening intentional act will generally sever the liability of the original tort-feasor"').

In addition to the foregoing, the wrongful death claims are also untimely, as the statute of limitations for wrongful death is two years from the decedent's death. N.Y. Est. Powers & Trusts Law § 5-4.1. As such, decedents that died two years prior to the commencement of this action are subject to dismissal as untimely.

Accordingly, Plaintiffs' tenth and eleventh causes of action must be dismissed.

IX. PLAINTIFFS' "PUNITIVE DAMAGES" CLAIM MUST BE DISMISSED

It is well settled that no separate cause of action for punitive damages exists. *Paisley v. Coin Device Corp.*, 5 A.D.3d 748-49 (2d Dept. 2004). A request for punitive damages is parasitic

and possesses no viability absent its attachment to a substantive cause of action. *Yong Wen Mo v. Gee Ming Chan*, 17 A.D.3d 356-59 (2d Dept. 2005). Said differently, a claim for punitive damages is not a separate claim but merely constitutes an element of single total claim for damages. *Benjamin Park v. YMCA of Greater N.Y. Flushing*, 17 A.D.3d 333 (2d Dept. 2005).

Accordingly, Plaintiffs' purported claim for "punitive damages" must be dismissed since a "separate cause of action for punitive damages is not legally cognizable[.]" *Jean v. Chinitz*, 163 A.D.3d 497, 498 (1st Dept. 2018). Courts have explained that when an underlying cause of action remains, a court "construe[s] the allegations contained in that part of the complaint denoted as a [a separate cause of action for punitive damages] to be part of ... [a former cause of] action." *Hobush v. Consol. Rail Corp.*, 117 A.D.2d 927 (3d Dept. 1986). *See also Heller v. Frota Oceanica E Amazonica, S.A.*, 18 Misc. 3d 1103(A) (Sup. Ct. 2007), *aff'd*, 81 A.D.3d 894 (2011). Punitive damages are simply a measure of damages which *may* be awarded.

Even if the Complaint sought punitive damages as a form of damages, rather than an independent claim, such damages are not available here. Punitive damages are only available in limited circumstances where it is necessary to deter defendant, and others like it, from engaging in conduct that may be characterized as "gross," "morally reprehensible," and of "such wanton dishonesty as to imply a criminal indifference to civil obligations." *Rocanova v. Equitable Life Assurance Society of the U.S.*, 83 N.Y.2d 603, 614 (1994) (internal quotation and citation omitted). "[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." *Id.*

Here, Plaintiffs fail to allege any conduct by Defendants that can be characterized as gross and morally reprehensible and directed at the public generally. As detailed herein, the claims in

the Complaint are frivolous, in their entirety, and do not support *any* award of damages, let alone punitive damages. *See* *Kelly v. Defoe Corp.*, 223 A.D.2d 529, 530 (2d Dept. 1996) (striking claim for punitive damages where plaintiff failed to show that conduct by defendant was so "willful and wanton, outrageously immoral, or criminal so as to warrant an award of punitive damages"). In accordance with applicable law, the claim for punitive damages must be dismissed in its entirety.

X. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF WARRANTY

The Complaint simply fails to sufficiently plead a breach of warranty cause of action. "Under New York law, warranties are generally limited to the sale of goods." *Jones-Soderman v. Mazawey*, No. 09-cv-3185, 2010 WL 54759, at *8 (S.D.N.Y. Jan. 6, 2010). Indeed, whether an express or implied warranty is alleged to have been breached, the Plaintiffs "must show that the product at issue was defective and that the defectively designed product was the actual and proximate cause of the plaintiff's injury." *Oden v. Bos. Sci. Corp.*, 330 F. Supp. 3d 877, 888 (E.D.N.Y. 2018), *adhered to on reconsideration*, No. 18-cv-0334, 2019 WL 1118052 (E.D.N.Y. Mar. 11, 2019) (emphasis added). If services are performed, the claim is one for negligence not sounding in a breach of warranty. *Mallards Dairy, LLC v. E&M Eng'rs. & Surveyors, P.C.*, 71 A.D.3d 1415, 1417 (4th Dept. 2010). Herein, the Complaint does not allege a sale of goods. Accordingly, this cause of action must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an order granting Defendants' motion to dismiss the Complaint, in its entirety, and awarding Defendants such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
February 21, 2023

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CERTIFICATION

In accordance 22 N.Y.C.R.R. § 202.8-b, counsel for defendants, EcoHealth Alliance, Inc., Peter Daszak, and Janet Cottingham, certify that the above memorandum of law in opposition contains less than 7,000 words exclusive of the statement of facts, the caption, table of contents, table of authorities, and signature block.

By: _____
Matthew R. Torsiello